Daya Anika Sdn Bhd v Maris Property Management Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-11 OF 1998
KAMALANATHAN RATNAM J
16 JUNE 1999

Civil Procedure *— Summary judgment — Appeal — Amendment of defence to include counterclaim and set off before hearing of application — Whether defence entitled to raise counterclaim and set off as triable issue — Whether plaintiff could rely on part of agreement excluding liablility while in another part liablity is admitted*

The plaintiff had claimed for the principal sum of RM243,020.25, which was part of RM277,642.30 it had originally claimed, as it could not produce supporting documents prior to 8 March 1997. The defendant had on 22 October 1998 filed an amended defence, pleading counterclaim and set off as the defendant contended that the plaintiff had supplied defective concrete resulting in additional work being carried out and delay in obtaining billing certificates of completion and had to pay two weeks' interest to the bridging financiers. The defendant had also complained of short supply, poor quality and failure to supply after confirmation. As a result, the parties signed an undated agreement in which the plaintiff agreed to replace the rejected concrete at their own expense. The defendant also claimed for idling wages and idle time for machinery due to the delay in supplying concrete. The plaintiff sought to exclude liability through a term of the agreement that any disagreement over the quantity supplied must be intimated to them within five days. It was further argued that the agreement excluded the plaintiff's liability as to loss of profit and consequential damage and the plaintiff could not be liable in respect of the set off and counterclaim. The deputy registrar granted judgment for RM220,000 as full and final settlement of the plaintiff's claim. The defendant appealed.

Held, allowing the appeal:

(1) The defence was entitled to raise a defence based on the cross-claim of set off and counterclaim, as it involved matters which formed part of the plaintiff's claim (see p 92C).

(2) As the plaintiff's statement of account for RM220,000 for the period from 30 May 1996 to 7 May 1997 contradicted its claim of RM243,020.25 from 8 March 1997 to 7 May 1997, a triable issue was raised (see p 92D–E).

(3) The agreement was not clear as to when the defendant should intimate in respect of the quantity of the concrete supplied as the agreement did not state when the five days commenced, thus giving rise to a triable issue (see p 92G–H).

(4) Notwithstanding the plaintiff's expression of admission in the agreement to pay for any losses arising from its supply of defective

concrete, the question of whether the plaintiff could rely on part of the agreement which was favourable to it, was a triable issue where the agreement had to be taken as a whole through a full trial (see p 93A–B).

[Bahasa Malaysia summary

Plaintif telah menuntut untuk jumlah utama sebanyak RM243,020.25 yang merupakan sebahagian daripada RM277,642.30 yang ia telah menuntut pada mulanya, oleh kerana ia tidak boleh kemukakan dokumen-dokumen untuk menyokong sebelum 8 Mac 1997. Defendan telah pada 22 Oktober 1998 memfailkan pembelaan terpinda, memplidkan tuntutan balas dan juga tolakan oleh kerana defendan telah menegaskan bahawa plaintif telah membekalkan konkrit yang tidak sempurna menyebabkan kerja tambahan terpaksa dibuat dan kelengahan dalam mendapatkan sijil bil penyelesaian dan terpaksa membayar faedah dua minggu kepada penyumbang kewangan perantara. Defendan juga telah mengadu bekalan yang kurang, kualiti yang rendah dan juga kegagalan untuk membekal selepas pengesahan. Sebagai akibat, pihak-pihak telah menandatangani suatu perjanjian yang tidak bertarikh di mana plaintif telah bersetuju untuk menggantikan konkrit yang ditolak di atas perbelanjaan mereka sendiri. Defendan juga menuntut untuk penghabisan gaji dan masa untuk mesin kerana kelengahan di dalam membekalkan konkrit. Plaintif juga memohon untuk mengecualikan tanggungan melalui suatu terma di dalam perjanjian bahawa sebarang pertikaian mengenai kuantiti yang dibekalkan mestilah diberitahu kepada mereka dalam masa lima hari. Adalah juga dihujahkan selanjutnya bahawa perjanjian tersebut telah mengecualikan tanggungan plaintif berkenaan dengan kehilangan keuntungan dan juga kerosakan berbangkit dan bahawa defendan tidak boleh bertanggungan berkenaan dengan tolakan dan tuntutan balas. Timbalan pendaftar telah memberikan penghakiman sebanyak RM220,000 sebagai penyelesaian penuh dan akhir tuntutan plaintif. Defendan telah merayu.

Diputuskan, membenarkan rayuan:

(1) Pembelaan berhak untuk membangkitkan pembelaan berdasarkan tuntutan balas dan juga tolakan, oleh kerana ia melibatkan perkara yang meliputi sebahagian daripada tuntutan plaintif (lihat ms 92C).

(2) Oleh kerana kenyataan akaun plaintif untuk RM220,000 untuk suatu tempoh dari 30 Mei 1996 hingga 7 Mei 1997 bercanggah dengan tuntutannya sebanyak RM243,020.25 dari 8 Mac 1997 hingga 7 May 1997, suatu isu yang boleh dibicarakan telah dibangkitkan (lihat ms 92D–E).

(3) Perjanjian tersebut adalah tidak jelas mengenai bila defendan sepatutnya memberitahu berkenaan dengan kuantiti konkrit yang

dibekalkan oleh kerana perjanjian tidak menyatakan bila lima hari akan bermula, dengan itu membangkitkan suatu isu yang boleh dibicarakan (lihat ms 92G–H).

(4) Dengan tidak menghiraukan pengakuan nyata plaintif di dalam perjanjian untuk membayar sebarang kerugian yang timbul daripada membekal konkrit yang tidak sempurna, persoalan sama ada plaintif boleh bergantung kepada sebahagian daripada perjanjian yang berpihak kepadanya, adalah suatu isu yang boleh dibicarakan di mana perjanjian mestilah diterima secara sepenuhnya melalui suatu perbicaraan penuh (lihat ms 93A–B).

Notes

For cases on appeal of summary judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4410–4434.

Cases referred to

Eddie Lee Kim Tak & Ors v Jurutera Konsultant (SEA) Sdn Bhd & Ors [1999] 2 MLJ 425 (refd)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (refd)

PT Lee (*Nily Ting Ong & Co*) for the appellant.

Tan Weng Soon (*Tan Eng Choong & Co*) for the respondent.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff's claim is for concrete sold and delivered to the defendant for a principal sum of RM277,642.30 for the period 30 May 1996 to 7 May 1997 together with interest of RM34,191.04 calculated up to 30 November 1997. The plaintiff's application for summary judgment is only for part of the plaintiff's claim in the principal sum of RM243,020.25 for the period 8 March 1997 to 7 May 1997 together with interest calculated up to 30 November 1997 as the plaintiff was unable to produce the delivery orders and invoices for the period up to 8 March 1997. On 10 February 1999, the deputy registrar had given judgment for RM220,000 in favour of the plaintiff as full and final settlement of the plaintiff's claim against the defendant.

The appeal

This is the defendant's appeal against the learned deputy registrar's decision given on 10 February 1999 whereby the plaintiff was allowed to enter summary judgment against the defendant for the sum of RM220,000 as full and final settlement of the plaintiff's claim against the defendant with

A interest and costs upon the concession by the plaintiff that it would not be claiming for any further sum other than that which it would prove before her. The deputy registrar therefore made no other order in respect of the balance sum.

B *Findings of the court*

Set off and counterclaim

The defendant had filed an amended defence on 22 October 1998 in which it had pleaded both a set off and counterclaim. In respect of the set off and C counterclaim the defendant has contended that the plaintiff had supplied defective concrete thus necessitating the same to be hacked off, removed and rectified. In an affidavit in reply (encl 7) a director of the defendant had exhed a letter from itself to the plaintiff dated 29 April 1997 (exh 5) complaining of the poor quality of the concrete supplied and as a result thereof the defendant had encountered 'problems of voids, serious D honeycombs, shrinkages and serious crackings'. In the said letter it had also contended that as a result of the defective concrete supplied there had been a two week delay in obtaining the billing certificates of completion of foundation works and reinforced concrete framework from the architect to claim payment from purchasers. Because of this it had to pay two weeks' interest to the bank for the bridging finance loan. It then exhibited a claim E amounting to RM85,778.78 being the extra interest paid to the bank and including claims for compensation to the contractors. Again by way of exh 4 also annexed to encl 7 the defendant did, by way of a letter dated 13 September 1997, complain to the plaintiff of: (1) short supply; (2) poor quality of the concrete; and (3) failure to supply even after confirmation. As F a result of all these complaints, both parties signed an undated agreement (exh YKC-4 to encl 8) which was a reply affidavit by the plaintiff. In that agreement the plaintiff had expressly agreed to replace rejected concrete at their own expense and in addition, to reimburse the defendant of all its expenses including hacking and removal of all defective concrete.

G Another factor relied on by the defendant is that the plaintiff had delayed in supplying the concrete that was ordered and that as a result therefore the defendant was claiming for idling wages and for idle time of the cranes and machinery. This was expressly brought to the attention of the plaintiff by, inter alia, the defendant's letter dated 4 January 1996 (exh 6 to encl 7). That the supply of concrete by the plaintiff was irregular was H brought to the plaintiff's attention also by way of exh 6. That there was a shortage in the quantity of concrete supplied was brought to the plaintiff's attention by way of an internal memo dated 29 October 1997 (exh 3 to encl 7). The plaintiff was also informed of the frequent breakdown of its generator and batching plant and truck by way of the defendant's letter dated 22 April 1997 (exh 6 to encl 7). As a result of the above-mentioned I breaches by the plaintiff there was a consequential delay in completion of the industrial project for which the concrete was being used and the plaintiff was given notice of same by way of letters dated 22 April 1996 and 24 May

1997 (exh 6 to encl 7). In *Eddie Lee Kim Tak & Ors v Jurutera Konsultant (SEA) Sdn Bhd & Ors* [1999] 2 MLJ 425, I had said at p 432A–B of the said judgment as follows:

> ... the defence of set-off is clearly available so long as the defendant is able to show that in equity, at least, it is unjust to allow for the summary judgment. In *Morgan & Son Ltd v S Martin Johnson & Co Ltd* [1949] 1 KB 107, the Court of Appeal showed the importance the court places to such a defence of equitable set-off by holding that where the defendant had a bona fide claim, which could be set up as an equitable set-off against the amount claimed by the plaintiff, unconditional leave to defend should be given to the defendant.

In the case before me as the matters dealt with by me are essentially connected with and form part of the matter on which the plaintiff's claim is founded, it is a cross-claim which the defendant is relying on as a set off and defence to the plaintiff's claim and which the defendant has also added as a counterclaim which the defendant is entitled to (see *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 (FC)).

Variations in the amount claimed in the O 14 application as compared to the sum in the statement of accounts

The plaintiff's statement of accounts issued to the defendant as from October 1997 claimed only a sum of RM220,000 which constitutes the whole of the plaintiff's claim for the period 30 May 1996 to 7 May 1997 (see exh 1 of encl 7). This clearly contradicts the plaintiff's claim for RM243,020.25 which is in respect of a shorter period as prayed for in the summary proceedings, that is, from 8 March 1997 to 7 May 1997. Something surely is amiss. On this ground too I find that the defendant has raised a triable issue. Incidentally what is most surprising is that this exh 1 in encl 7 was not exhibited by the plaintiff at all. It was done by the defendant and despite this, the plaintiff did not see it fit to amend its statement of claim. Whilst there is an admission by the defendant, in its further affidavit, to a sum of RM55,319 for concrete sold and delivered I shall not enter judgment for the said sum as yet in the light of the defendant's plea of set off and counterclaim.

As for the plaintiff's argument that since there was a term in the agreement (exh YKC-4) that any disagreement over the quantity supplied must be intimated to the plaintiff in writing within five days, and since the defendant had failed to so intimate, the defendant cannot now complain, the simple answer lies in the badly drafted agreement. The agreement does not state that the defendant must intimate in respect of the quantity of the concrete supplied, within five days of receipt of the supply of concrete from the plaintiff. It merely states that the defendant must intimate within five days. Within five days of what? Surely the answer to this in itself raises a triable issue. And besides, this agreement in which the plaintiff rests so heavily, is undated.

The plaintiff argues that since the agreement had excluded the plaintiff's liability, if any, towards the defendant's loss of profit, consequential damage or costs or any indirect loss or damage, the plaintiff

A cannot therefore be liable in respect of the set off and counterclaim. The question this court has to ask is that in the light of the plaintiff's denial of its liability, notwithstanding its express admission in the same agreement to pay for any loss or expense due to hacking and removal of all defective concrete, arising out of its supply of defective concrete, whether the plaintiff can rely on that part of the agreement that is favourable to it. At this stage,
B I hold that the plaintiff cannot approbate and reprobate. This in itself raises a triable issue. The whole agreement has to be taken through a full trial.

The appeal is therefore allowed and the judgment of the learned deputy registrar dated 10 February 1999 is hereby set aside. I shall fix a date for trial.

C *Appeal allowed.*

Reported by Chin En Tek

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